

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

OSCAR ZAMUDIO-GONZALES

Claimant

VS.

MONFORT, INC.

Respondent

Self-Insured

Docket No. 239,798

DECISION

Claimant appealed Administrative Law Judge Pamela J. Fuller's March 5, 2001 Decision. The Appeals Board (Board) heard oral argument on August 29, 2001.

APPEARANCES

Russell B. Cranmer of Wichita, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent, self-insured.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Administrative Law Judge's Decision.

ISSUE

The only issue before the Board is the nature and extent of claimant's disability. The Administrative Law Judge (ALJ) awarded claimant permanent partial disability benefits based on his stipulated 14.5% functional impairment. The ALJ denied claimant's entitlement to work disability benefits because respondent terminated claimant for a safety violation. Claimant argues on appeal that he is entitled to work disability benefits because the ALJ erroneously found that respondent was justified in terminating claimant. Respondent counters that the Board should affirm the ALJ's decision because respondent

terminated claimant for an inexcusable safety violation that almost cost another employee her hand.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the parties' stipulations, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law consistent with the ALJ's Decision:

Claimant was a maintenance supervisor for respondent, a beef processing plant. During the relevant time frame and in the ordinary course of respondent's business, employees utilized equipment that posed serious health risks for employees, including great bodily harm and death. As a result, respondent required employees to lock dangerous equipment during cleaning and inspection.

On the date in question, an employee locked the "gut table" for a preliminary inspection prior to a formal USDA inspection. Respondent required the "gut table" to be locked under such circumstances because inspection actually required individuals to physically enter the machine. Accordingly, the only way respondent could insure employee safety was by having employees lock the machine's power source with what respondent and claimant called a lockout and tagout device.

Claimant does not dispute that he committed a safety violation by failing to follow company procedure regarding the removal of a lockout and tagout device. Claimant and his crew needed to perform maintenance on a locked "gut table" prior to the USDA inspection. Unfortunately, the lockout and tagout device was unidentifiable because its owner failed to tag the device as required by company procedure. Nevertheless, according to company procedure, claimant should have attempted to locate the owner of the device, completed a lock removal form, and obtained the signatures of two supervisory employees prior to removing the device. Claimant failed to do so.

Claimant argues first that his medical condition impaired his judgement, and that he committed the safety violation due to his impaired reasoning capacity. He also argues that he is entitled to work disability benefits because his termination was merely a retaliatory action for filing a workers compensation claim and seeking an accommodated position. According to claimant, respondent actually fired him only after he presented medical restrictions from an unauthorized physician indicating that he could no longer perform his duties as a maintenance supervisor.

The Board is not persuaded by claimant's arguments or the testimony of claimant's unauthorized physician. Post-injury, claimant performed his duties and made vital decisions as a maintenance supervisor without incident for over one year prior to the safety violation now at issue. By his own admission, claimant never requested an accommodated position and actually continued to satisfactorily perform his duties without complaint for over one month after submitting the unauthorized physician's restrictions. Consistent with

his behavior and long-standing job performance, the company's physician testified that the duties of a maintenance supervisor were well within claimant's restrictions. Accordingly, the Board finds that claimant's post-injury job was within his restrictions, and claimant did not commit the safety violation at issue because of the residuals of his injury.

Additionally, the Board affirms the ALJ's denial of work disability benefits based on the nature of claimant's termination from employment. In cases involving entitlement to work disability benefits, a claimant must establish a nexus between his or her injury and his or her wage loss.¹ Essentially, respondent has a valid defense against liability for work disability benefits because the evidence or record establishes that claimant's wage loss is related, not to his disability, but to his bad faith.²

K.S.A. 1998 Supp. 44-510e(a) prohibits work disability compensation if a claimant is earning 90 percent or more of his or her average gross weekly wage computed as of the date of accident. The Kansas appellate courts, beginning with Foulk v. Colonial Terrace,³ bar a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his or her pre-injury wage at a job within his or her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. Foulk and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.⁴

The Court has held that some violations of company policies and procedures mandate invocation of the principles set forth in Foulk.⁵ However, not all violations do so.⁶

In the case at bar, respondent had an established safety procedure in place regarding the removal of the lockout and tagout device if the individual who applied the device was unavailable to remove it. By his own admission, claimant did not follow this procedure. Claimant was well aware of respondent's safety procedure, but nevertheless failed to follow company protocol implemented to insure employee safety. Although there

¹ Hernandez v. Monfort, Inc., ___ Kan. App. 2d ___, 41 p.3d 886, *rev. denied* ___ Kan. ___ (2002).

² Copeland v. Johnson Group, Inc., 24 Kan.App.2d 306, 320, 944 P.2d 179 (1997)

³ 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁴ Oliver v. Boeing Co., 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

⁵ See Ramirez v. Excel Corp., 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ___ Kan. ___ (1999); See also Escarcega v. National Beef Packing Co. & Wausau, WCAB Docket No. 244,338 (December 2001).

⁶ See Niesz v. Bill's Dollar Stores, 26 Kan. App. 2d 737, 993 P. 2d 737, 993 P. 2d 1246 (1999); See also Crider v. Eaton Corp., WCAB Docket No. 250,068 (July 2001) and Bowers v. Cessna Aircraft Company & Kemper Insurance Company, WCAB Docket No. 216,956 (January 1999) [Affirmed by unpublished Court of Appeals opinion, Docket No. 82,648, November 19, 1999].

was a dispute as to whether anyone was actually subject to injury on the date in question, respondent considered claimant's breach as a potentially life threatening safety violation. Respondent's belief was reasonably based on the fact that the employee that locked the machine, armed with the assumption that her safety was secure based on company procedure, could have entered the equipment and been dismembered or even decapitated because of claimant's actions. Even claimant admitted at the Regular Hearing that other individuals had been killed based on the same safety violation. In light of a clear company procedure prohibiting claimant's actions and claimant's knowledge of the procedure, as well the danger associated with his actions, the Board finds that claimant's actions do violate the principles of Foulk.

The loss of claimant's accommodated job paying 90 percent or more of his average weekly wage resulted from claimant's knowing and wilful violation of respondent's company procedure. Had this violation not occurred, claimant could have continued working for respondent at a comparable wage. The Board, therefore, will impute the wage claimant was earning at the time of the termination. As this was more than 90 percent of claimant's average weekly wage on the date of accident, claimant is limited to compensation calculated by using his percentage of functional impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Administrative Law Judge Pamela J. Fuller's March 5, 2001 Decision is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director